



Australian Government

Immigration Assessment Authority

Decision and Reasons

Referred application

SRI LANKA
IAA reference: IAA17/03598

Date and time of decision: 11 May 2018 11:01:00
Gabrielle Deal, Reviewer

Decision

The IAA affirms the decision not to grant the referred applicant a protection visa.

Any references appearing in square brackets indicate that information has been omitted from this decision pursuant to section 473EC(2) of the Migration Act 1958 and replaced with generic information which does not allow the identification of a referred applicant, or their relative or other dependant.

Background to the review

Visa application

1. The referred applicant (the applicant) claims to be a Tamil from Sri Lanka. On 8 November 2012 he arrived by boat in Australia. On 31 August 2016 an application for a Safe Haven Enterprise Visa (SHEV application) was lodged on the applicant's behalf with the Department of Immigration, now part of the Department of Home Affairs.
2. On 12 September 2017 a delegate of the Minister for Immigration and Border Protection (the delegate) refused to grant the visa (the delegate's decision). Broadly, the delegate did not believe the applicant's key claims given the lack of detail and consistency in his evidence. The delegate refused the visa on the basis the applicant did not have a well-founded fear of persecution in Sri Lanka and did not, therefore, meet the relevant definition of refugee, did not face a real risk of significant harm and was not a person in respect of whom Australia has protection obligations.

Information before the IAA

3. I have had regard to the material given by the Secretary under s.473CB of the *Migration Act 1958* (the Act).
4. On 6 October 2017 the IAA received a submission from the applicant. To the extent the submission engages in argument with the delegate's decision based on information which was before the delegate I have had regard to these arguments. In part it restates claims made to the delegate which are already before me.
5. The submission also includes new country information and claims, namely:
 - Copy of a July 2015, International Truth and Justice Project (ITJP) report on torture in Sri Lanka "A still unfinished war: Sri Lanka's survivors of torture and sexual violence 2009 – 2015 (ITJP 2015 report).
 - Copy of the Special Rapporteur's preliminary findings following its visit to Sri Lanka dated July 2017 (Special Rapporteur article).
 - Reference to a 2017 ITJP report (ITJP 2017 report) as well as a number of other country information reports in the submission in support of the assertion, broadly, that even tenuous links to the Liberation Tigers of Tamil Eelam (LTTE) may bring a person adverse attention from the Sri Lankan authorities.
 - A statement that the applicant attended LTTE commemorative events while in Australia.
6. The 2015 ITJP report pre-dates the delegate's decision by more than a couple of years. It examines 20 cases of abduction and torture. The victims are not identifiable. The Special Rapporteur article discusses the preliminary findings of the UN Special Rapporteur following his visit to Sri Lanka in July 2017 where he privately meet with detainees under the *Prevention of Terrorism Act* (PTA) (the article does not identify any), their lawyers and relevant government representatives in assessing Sri Lanka's progress in its fight against terrorism as measured against international human rights law. It also predates the delegate's decision. The applicant is relatively young [but] was assisted by a registered migration agent in the presentation of his case before the Department, who did provide a submission, referring to relevant country information, in support. The applicant has not explained why

the information could not have been provided earlier. I am not satisfied that either contains personal information. I am not satisfied that s.473DD(b)(i) or (ii) is met.

7. The submission also makes reference to the ITJP's 2017 report, in reliance of the assertion that "many people who were tortured are former low level LTTE members". No copy or extract of the report was provided. The IAA Practice Direction¹ relevantly states that in relation to new country information reports, copies or extracts must be provided, and hyperlinks are not acceptable. The submission was prepared and lodged by the applicant's representatives, experienced migration practitioners who would be aware of the requirements of the IAA Practice Direction. I have decided not to accept this information. I note as an aside that even if I were to accept it, on the information provided, the information appears to predate the delegate's decision and is not what may be considered 'personal information' in this context and as such s.473DD(b) is not met.
8. The submission contains an extract from a January 2017 UN Report which states "numerous individuals suspected of having a link, however remote, with the Liberation Tigers of Tamil Eelam have been abducted and then subjected to brutal torture, often including sexual violence and rape of men and women". I am not satisfied it contains personal information, or, given its date, and the applicant's circumstances, that it could not have been provided to the delegate before the decision was made. I am not satisfied that s.473DD(b)(i) or (ii) is met and I am unable to consider the information.
9. The new claim, that the applicant attended Heroes Day events in Australia in 2016 and one other time a few years ago to commemorate the deaths of LTTE fighters, relates to events that would have been known to the applicant for some time prior to the SHEV interview. I am satisfied that this amounts to credible personal information for the purposes of s.473DD(b)(ii). The lawyer states that the applicant did not mention these events earlier because his former representative never asked him if he had attended these types of events and given the applicant's age at the time he did not realise the importance of disclosing this information. At the time of the SHEV interview the applicant would have been almost 20 years of age and he was advised in that interview that it was his responsibility to provide all his claims and supporting information as early as possible, including in that interview. He was also asked on more than one occasion if there were any other reasons he feared returning to Sri Lanka. In the SHEV interview the delegate clearly advised the applicant he did not think the applicant would be of any interest to the authorities in Sri Lanka based on his profile and that he did not understand why the authorities would be looking for him now. I find the applicant's explanation for not having mentioned his attendance at these events earlier, particularly given the events commemorated the deaths of LTTE fighters and his central claim was that his links to the LTTE brought him under suspicion, unsatisfactory. There are no details of when or where these events took place (except in the broadest possible terms) and the applicant has provided no other evidence to corroborate this claimed attendance. I am not satisfied that exceptional circumstances exist to justify consideration of the information.

Applicant's claims for protection

10. The applicant's claims can be summarised as follows:
 - He is a young Tamil male from the Northern Province of Sri Lanka. Due to the conflict his family was displaced into another area in the Northern Province in 2000.

¹ IAA Practice Direction 1, "Practice Direction for Applicants, Representatives and Authorised Recipients", 6 February 2017.

- In 2000 when he was about [age], his father disappeared.
- In 2006 the Criminal Investigation Division (CID) and army started to harass his family. They questioned him about his father's disappearance and told him that his father had disappeared because he joined the LTTE. They accused the applicant of having LTTE links.
- In 2006 an uncle living with them at that time was beaten up by the authorities. He subsequently left Sri Lanka in 2006 and successfully sought asylum in Australia. Another uncle, who was living next door, was taken away and interrogated and tortured by the CID. He later relocated to another area in Sri Lanka.
- The army continued to threaten and harass him on suspicion of supporting the LTTE until he departed Sri Lanka.
- He fears he will be imprisoned, tortured or otherwise harmed by the CID and/or the army, in particular, when he returns to his home village and is required to register his address with local authorities. He left Sri Lanka illegally and will return a failed asylum seeker.

Factual findings

11. Based on the applicant's documentary evidence, including his birth certificate, and his oral evidence I accept he is a young Tamil male from Jaffna in the Northern Province of Sri Lanka. I accept that due to the conflict his family was displaced and moved to another area in the Northern Province when young, eventually relocating to [Town 1], also in the Northern Province where he lived until departing Sri Lanka in 2012. I also accept the applicant completed up to [a certain level of] schooling in Sri Lanka and has undertaken further studies while in Australia.
12. The applicant stated in his SHEV application that he was very young during the war and so could not remember much about that time. At the time of the claimed events in 2006 in Sri Lanka the applicant would have been about [age years] old. He claims on-going harassment by authorities from 2006 until his departure in 2012 when he would have been about [age]. In the arrival interview he indicated he was in regular contact with his family in Sri Lanka including his mother who he calls weekly. The applicant claims to call his uncle in [Australia], who used to live with the applicant in Sri Lanka and had first-hand experience of the claimed incidents in 2006, weekly. Another uncle, who travelled with him to Australia on the boat, appears to be the other uncle who was questioned and harassed in Sri Lanka in 2006. Given his close relations and frequent contact with these family members, I consider they would have also been able to provide him with some insight into the events that took place when he was much younger. I do not accept his young age at the time explains the lack of detail in his evidence.
13. In the SHEV interview the applicant's representative stated that because of the applicant's young age, lack of schooling and lack of familiarity with the legal process and interview process he had been unable to speak in depth about his claims in that interview. In a post interview submission the applicant's representative states "we note that during the course of the interview our client struggled to give detailed answers in our view this was a result of his young age and inexperience, rather than an unwillingness to present his claims. We submit our client's credibility be assessed in light of his trying personal circumstances".

14. The applicant was almost [age] when he attended the SHEV interview, had completed up to year 10 schooling in Sri Lanka as well as additional studies while in Australia and had moved out from his uncle's place in Australia and was living independently at that time. Many other visa applicants would have a similar level of familiarity with the legal process and interview process in Australia. An uncle attended his arrival interview and his agent attended his SHEV interview. Accredited interpreters attended both interviews. He had the assistance of his migration agent and an accredited interpreter in preparing his SHEV application. During the SHEV interview the applicant said he had read and understood the information sheet forwarded to him by the Department entitled "Important information about your protection visa interview" which explained Australia's protection visa obligations and the delegate reiterated that it was the applicant's responsibility to provide his claims and supporting information.
15. The applicant was given a number of opportunities to provide as much detail as possible in relation to his claims. Having listened to the arrival interview I found the officer did not hurry the applicant and conducted the interview in a manner that was accommodating of his young age at that time. Whenever he provided a brief response to her question, she further probed him in an effort to elicit as much information as possible. Similarly in the SHEV interview, whenever the applicant provided a response that was vague or brief the delegate would further probe the applicant in an effort to elicit more detail from him. Near the end of the interview the delegate asked if there were any other reasons he feared returning and the applicant again mentioned his claimed LTTE links. The delegate then asked again if there were any other reasons and after the applicant's brief response, the delegate asked whether the applicant thought that being a Tamil put him at risk, to which the applicant agreed. The delegate also mentioned that anything given to him before his decision was made would be considered.
16. I do not accept the applicant was unable to put forward or discuss his claims or supporting information because of his young age, lack of education or lack of familiarity with the legal system or interview process.
17. The applicant has consistently claimed that in about 2000 when he was [age], his father disappeared. He has said that they searched for him but could not find him. I found the applicant's responses to the officer's questions during the arrival interview about his father's disappearance to be natural and spontaneous. I accept this claim.
18. The applicant claims that in 2006 when he was about [age] or [age] the CID and the army started to visit his home and harass the family. They said they knew his father was a member of the LTTE. His uncle, who was living with them at the time, was beaten up by the army and fled to Australia by boat in 2006 and was granted asylum and has subsequently become an Australian citizen. His other uncle, who lived next door to them, was taken for interrogation by the CID and when he was released he relocated to another village. They used to talk to the applicant when they came to his house, because he was the eldest son. They used to threaten him and his mother. His sisters were very frightened. They told his mother that his father was an LTTE member and that that was why he was killed. They accused the applicant of being an LTTE supporter. His mother was afraid of these people and feared for the safety of her family. His mother and uncles have told him that his father had nothing to do with the LTTE but he believes his father was killed by the authorities on suspicion of involvement with the LTTE.
19. In the arrival interview the applicant said the army used to threaten him "once in a while". When asked what they said he appeared to state they threatened his mother and when

asked again what they said he said he did not understand them as they spoke Sinhalese. He later said that the army used to tell him he was in the movement and that he used to work for the movement. He said he did not have any involvement with the LTTE and did not work for them.

20. In the SHEV interview the applicant said that his mother [and siblings] continued to live in the same house in [Town 1] where he had lived prior to his departure. When asked if he knew anything about his father's disappearance the applicant said "...we don't know anything about it. I don't know". He said neither his father nor any other members of his family had been LTTE members. The delegate asked him if the authorities told him his father was a member of the LTTE and the applicant said that they did, they had said he died as a result of joining the LTTE. When asked why the authorities would continue to visit his house he said that his father disappeared, he was the eldest son, and his uncle was also taken and beaten severely but that he had left the country. The delegate asked him if he were questioned by the CID prior to leaving Sri Lanka and he said that when he was at home they came and asked him questions. When asked how many times this occurred he said "very often they would come". When asked if he were ever arrested or mistreated by them he said he was not but that they took the uncle at that time and interrogated and mistreated him. The applicant has previously claimed both uncles were taken and mistreated in about 2006 not 2012. When asked who he feared, he said the CID and army.
21. The country information before me states that immediately after the war Sri Lankan authorities subjected a large number of civilians suspected of LTTE links to screening, monitoring and arbitrary, sometimes prolonged, detention without charge in an effort to thwart anti-government sentiment or the re-emergence of the LTTE.² It also states that from 2006 until 2008 paramilitary groups operated in the Northern Province, carried weapons and were perceived as part of the government by the local people.³ They carried out politically motivated abductions, including "white van abductions" and targeted people who had been in touch with the LTTE, including family members.⁴ Some military groups joined the government after the end of the conflict.⁵ The security situation in Jaffna had improved by 2010 and the military presence had been greatly reduced when compared to the period 2006 until 2008 when the number of abductions and killings in the area were much higher.⁶ However because of increased criminal activity which appeared to be perpetrated by paramilitary groups and was believed to be connected with the general elections in April 2010 and a sense that the abductions and killings had started again, the military presence in the area was again increased.⁷ It was also observed at the time that there was a potential for the military to abuse their powers as their activities were not subject to any checks or balances. The military were conducting random checks on people's cars and targeting young people.⁸
22. The applicant lists two uncles in his SHEV application and both are listed as being in Australia. One is listed as an Australian citizen and the other is listed as a Sri Lankan citizen. In his SHEV application he states that his uncle, who was living with them, was beaten up by the CID and SLA in 2006. He travelled by boat to Australia about 10 years ago and was granted asylum

² UK Home Office, "Country Policy and Information Note. Sri Lanka – Tamil Separatism. Version 4.0", 31 March 2017, OG6E7028822, p.42.

³ Danish Immigration Service, "Human Rights and Security Issues concerning Tamils in Sri Lanka", 71, 1 October 2010, CIS19345, p.12.

⁴ Ibid.

⁵ Ibid.

⁶ Ibid, p.10.

⁷ Ibid.

⁸ Ibid.

and has since become an Australian citizen. In the arrival interview he stated that this uncle was his mother's brother, that he lived in [a city in Australia] and that he spoke with him on the phone about once a week. In the SHEV interview when asked what sort of visa his uncle had, he said he was a citizen and that he arrived in Australia about six years ago. No further information about this uncle was provided such as the circumstances and background in relation to his journey to Australia or his seeking asylum. In his SHEV application he states that a second uncle, who was living next door, was taken in for interrogation by the CID. It appears this occurred after the first uncle's incident but in the same year. He states that this uncle moved to another village in Sri Lanka as he "was very frightened and warned off by the CID". There is no evidence to suggest this uncle was arrested at the end of the war. In the SHEV interview he said he had two uncles in Australia and that one uncle accompanied him on the boat to Australia and the other uncle had come to Australia earlier and was his mother's brother. It appears the uncle who accompanied him to Australia was the uncle who had previously moved to another village in Sri Lanka after being interrogated by the CID in 2006. No further information about the background or circumstances leading to his second uncle's journey to Australia was provided.

23. At the time of the first claimed harassment by the CID and army in 2006 the applicant would have been about [age] or [age] years of age. When he left Sri Lanka he was [age]. I consider it implausible that the CID and army would question and harass the applicant from the young age of [age], suspect him of having worked for the LTTE at that young age, or that they would continue to question and harass him over the five years that followed prior to his departure to Australia, without acting on those threats. It is also unclear why the authorities would start harassing the family in respect of his father, six years after his father had disappeared. He has also claimed he did not understand what was said by the authorities because they spoke Sinhalese. Yet on another occasion he claimed they harassed and questioned him. The applicant has not said he was detained, arrested or mistreated by the authorities. The applicant claims to have been questioned by the authorities over an extended period of time. I found his evidence in relation to his questioning by the authorities in the years after 2006 and up until his departure to be extremely vague and generalised. In his SHEV application he states that after finishing his studies his mother arranged for his boat journey to Australia; it appears finishing his studies precipitated his departure from Sri Lanka.
24. The applicant's representative states in a post-interview submission that it was not implausible that the authorities to have suspected the applicant of having LTTE links at a very young age. The country information before me indicates however, that even child soldiers recruited into the LTTE were much older than the applicant at that time, being mostly 16 or 17 years of age.⁹
25. The applicant claims a few people in his home village were shot by the army which also frightened his mother. In the SHEV interview he said the army and CID suspected these three people and "came and without any question or interrogation three people were shot dead that is why I am in fear...the same thing would happen to me". On returning from a break, the applicant said he wanted to clarify that one of the victims was his friend's brother and "most of the time I spent with him...they accused he is involved in the movement after three days he was shot dead". I am willing to accept he may have known one of the victims well but the applicant has provided very little further detail about this. There is no evidence before me to suggest the applicant was harassed by the authorities because of his association with this victim.

⁹ Danish Immigration Service, "Human Rights and Security Issues concerning Tamils in Sri Lanka", 71, 1 October 2010, CIS19345, p.18.

26. On the totality of the evidence before me, I accept the military may have suspected the applicant's father was a member of the LTTE and questioned and harassed his family in connection with this in 2006. I also accept the applicant may have known someone who was shot by authorities in suspicion of LTTE links. I accept his uncles may have been questioned and mistreated on suspicion of LTTE links during the conflict, as many young Tamil males were at that time in the Northern Province of Sri Lanka. It appears both uncles are now in Australia. However, I do not accept the authorities suspected the applicant was, or accused him of being, a member or supporter of the LTTE. Nor do I accept he continued to be questioned or harassed by the authorities in the years that followed.
27. The applicant claims that his mother has told him that since leaving Sri Lanka the authorities have continued to harass the family and look for the applicant and that his mother has stopped answering the door as a consequence.
28. In the SHEV interview the delegate asked if his siblings had problems with the authorities given they remained in the same family home he lived in prior to his departure and he said that they did. He said the authorities would sometimes visit the house and that they visited two or three times a week and last visited last week (which at that time would have been around December 2016). When asked for details about what they said, he said his mother would not tell him. When asked if the authorities had asked about the applicant recently he said that they did, they were asking his family where he was. When asked why they would be looking for him he said he did not know the reason and later stated "relating to the LTTE". When the delegate asked why they would be interested in him, especially given his young age when the war ended and when he left Sri Lanka the applicant said "I don't know, I don't know what the reason behind that...they would visit and ask our names that is why my mother arranged...to leave the country". The delegate noted that the applicant said in his SHEV application that his mother had stopped answering the door to the authorities and asked if this meant she no longer had any interactions with them. The applicant replied with "...yeah my mother will never reveal my whereabouts because I will be in trouble".
29. In a post interview submission the applicant's representative stated it was plausible the applicant gave vague responses and did not know much detail about the circumstances regarding his family's harassment because his mother did not pass this sort of information onto him, not wanting to burden him with this information and that the applicant may also be feeling a heavy sense of guilt for having left the family behind in Sri Lanka. I do not accept this explanation. The fact that she purportedly told him at all about the visits does not sit easily with any claimed reluctance to not burden the applicant. Furthermore, I do not accept the authorities continued to question or harass the applicant after 2006 or that he was of interest to the authorities when he left Sri Lanka in 2012. Not being of any interest to the authorities when he left Sri Lanka, it follows I do not accept the authorities have continued to visit his family home looking for him since departing Sri Lanka in 2012.

Refugee assessment

30. Section 5H(1) of the Act provides that a person is a refugee if, in a case where the person has a nationality, he or she is outside the country of his or her nationality and, owing to a well-founded fear of persecution, is unable or unwilling to avail himself or herself of the protection of that country; or in a case where the person does not have a nationality—is outside the country of his or her former habitual residence and owing to a well-founded fear of persecution, is unable or unwilling to return to it.

Well-founded fear of persecution

31. Under s.5J of the Act 'well-founded fear of persecution' involves a number of components which include that:
- the person fears persecution and there is a real chance that the person would be persecuted
 - the real chance of persecution relates to all areas of the receiving country
 - the persecution involves serious harm and systematic and discriminatory conduct
 - the essential and significant reason (or reasons) for the persecution is race, religion, nationality, membership of a particular social group or political opinion
 - the person does not have a well-founded fear of persecution if effective protection measures are available to the person, and
 - the person does not have a well-founded fear of persecution if they could take reasonable steps to modify their behaviour, other than certain types of modification.
32. I accept the applicant is a young Tamil male from the Northern Province of Sri Lanka and that his family was questioned by the authorities in 2006 in relation to his father. I accept his two uncles were questioned and mistreated at that time on suspicion of having LTTE links, as were many young Tamil men in the Northern Province of Sri Lanka toward the end of the war. I accept the applicant may have known someone who was shot by authorities on suspicion of LTTE links but do not accept the authorities suspected him of LTTE links because of this. I do not accept the applicant or his family continued to be harassed or questioned by the authorities after 2006. I do not accept the applicant was of interest to the authorities when he left Sri Lanka in 2012 or that they have continued to harass his family and look for him since his departure from Sri Lanka in 2012.
33. The available country information reports of improvements in Sri Lanka since the applicant's departure in 2012 and particularly since the election of the Sirisena government in 2015. It has prioritised human rights and reconciliation and made significant progress, including replacing military governors in the Northern and Eastern Provinces with civilians; returning some land held by the military; releasing some people held under the PTA; committing to reform the PTA; engaging constructively with the United Nations; as well as putting in place a number of symbolic changes.¹⁰ Nevertheless, the government has been more recently criticised for its slow progress in relation to some of the promised changes, including the repeal of the PTA since being elected.
34. DFAT reported in 2017 that the monitoring and harassment of Tamils in day-to-day life had significantly decreased, was no longer state-sponsored or systemic and that members of the Tamil community have described a positive shift in the nature of interactions with the authorities.¹¹ The UK Home Office has more recently stated that it considers being of Tamil ethnicity does not, in itself, warrant international protection.¹²

¹⁰ DFAT, "DFAT Country Information Report – Sri Lanka", 24 January 2017, CISED50AD105.

¹¹ Ibid, p.12.

¹² UK Home Office, "Country Policy and Information Note. Sri Lanka: Tamil separatism. Version 4.0", 31 March 2017, OG6E7028822, p.13.

35. DFAT reports that the government remains sensitive to the potential re-emergence of the LTTE.¹³ The country information indicates that those most at risk are those who are perceived to be playing a significant role in post-conflict Tamil separatism such as LTTE's former leadership (combat or civilian) and/or former members who were suspected of having committed terrorist or serious criminal acts during the conflict or of providing the LTTE with explosives or weapons.¹⁴ Consistent with this DFAT and the UK Home Office reported that two lists of persons-of-interest to Sri Lankan law enforcement agencies are currently maintained, a 'stop list' and a 'watch list'.¹⁵ People on the 'stop list' are either perceived to be connected to terrorism or to have committed serious crimes and against whom there is an extant court order or arrest warrant and will be stopped at the airport and handed over to the appropriate Sri Lankan authorities. The UK Home Office assesses that these people may be harmed while in detention. Those on the 'watch list' are former LTTE cadres or those who have committed more minor offences and are unlikely to be detained. There is no credible evidence that the applicant is on a stop or watch list or that the time he has spent in Australia would be viewed adversely.
36. The December 2016 Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment on his mission to Sri Lanka¹⁶ included, among other things, numerous interviews with former and current detainees as well as torture survivors. It concluded that the practice of torture, while less prevalent and severe than during the conflict, persisted and was used against suspects being interviewed by the CID in criminal investigations and the Terrorist Investigation Division under the PTA which continues to apply to investigations into national security-related offences. In relation to investigations under the PTA it was found there was a causal link between the level of perceived threat to national security and the physical suffering inflicted by the authorities on victims. The report states that anyone deemed to have any link to the LTTE during the conflict and political and human rights activists remain subject to extensive surveillance and intimidation by the military, intelligence and police forces although to a lesser extent now than immediately after the war. However after the visit, the President was said to have issued new directives to the authorities prohibiting the use of torture in connection with arrests and detention under the PTA and reiterating the mandate that the National Human Rights Commission (HRC) be informed of all arrests under the PTA and provide the HRC with unrestricted access to places of detention. DFAT's 2017 report states torture by the authorities is not systematic or state-sponsored and any allegations of torture pertain to a relatively small number of cases.¹⁷ It is also noted that the law in Sri Lanka makes torture a punishable offence with a mandatory sentence of not less than seven years imprisonment and the constitution prohibits torture and cruel treatment in Sri Lanka.¹⁸
37. There is no credible evidence before me to suggest the applicant has ever worked or supported the LTTE or was ever involved in any protests or political parties advancing the Tamil cause. I do not accept that after 2006 the applicant or his uncles continued to be of interest to the authorities, on suspicion of LTTE links.
38. Based on the applicant's profile and the country information discussed above, I am not satisfied that there is a real chance the applicant will be detained, tortured or otherwise harmed because

¹³ DFAT, "DFAT Country Information Report – Sri Lanka", 24 January 2017, CISED50AD105, p.15.

¹⁴ UK Home Office, "Country Policy and Information Note. Sri Lanka – Tamil Separatism. Version 4.0", 31 March 2017, OG6E7028822, p.7.

¹⁵ DFAT, "DFAT Country Information Report – Sri Lanka", 24 January 2017, CISED50AD105, p.15; UK Home Office, "Country Policy and Information Note. Sri Lanka – Tamil Separatism. Version 4.0", 31 March 2017, OG6E7028822, pp.58-59.

¹⁶ United Nations, "Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment on his mission to Sri Lanka A/HRC/34/54/Add.2", 22 December 2016, CIS38A80123313.

¹⁷ DFAT, "DFAT Country Information Report – Sri Lanka", 24 January 2017, CISED50AD105, pp.28,29.

¹⁸ US Department of State, "Country Report on Human Rights Practices 2016 – Sri Lanka", 3 March 2017, OGD95BE926876, pp.3,4.

he is a young Tamil male from Jaffna, his father's disappearance, his or his uncles past experiences in Sri Lanka or status in Australia or because he has lived in Australia as an asylum seeker for the past five years, now or in the reasonable foreseeable future, if he were to return to Sri Lanka.

39. I accept that on return the applicant may be identified by the authorities as a returning asylum seeker. While it is acknowledged DFAT does not routinely monitor the situation of returnees DFAT assess that the risk of torture or mistreatment of the majority of returnees is low, including for those found to have departed illegally.¹⁹ There were reports of 16 Tamil men being arrested at the airport after returning from working in the Middle East in 2015, with *TamilNet* reporting that almost all the victims were ex-LTTE members who had previously undergone rehabilitation.²⁰ In a 2015 report *Freedom from Torture*²¹ referred to a study it conducted of 148 cases of alleged torture in Sri Lanka, 55 of which concerned those who had returned to Sri Lanka from the United Kingdom (UK) following the end of the conflict and of those three had been forcibly returned after their asylum claims were rejected. It was reported that in the majority of cases they had been interrogated about their activities and/or contacts in the UK and a key factor in their detention and torture was that they had some association with the LTTE or had been associated with the LTTE by the authorities in some way. It is noted, *Freedom from Torture's* report is now somewhat dated. While noting they were unable to verify the claim, DFAT also reports that the Sri Lankan government have advised them that no returnee from Australia has been charged under the PTA.²² Other than his questioning in about 2006, I do not accept the applicant was otherwise harassed or questioned by the authorities on suspicion of having LTTE-links while in Sri Lanka.
40. I do not accept the applicant is of any ongoing interest to the authorities, and I am not satisfied that there is a real chance the applicant will be imprisoned, tortured or otherwise harmed by the authorities, including the CID or the army, when he returns to his home village or otherwise on his return to Sri Lanka as a returning Tamil asylum seeker.
41. I accept the applicant left Sri Lanka illegally and that on return he may be identified by the authorities as such. DFAT's 2017 report²³ and the UK Home Office's 2017 report²⁴ indicate that following arrival at the airport, returnees will be processed en masse by a number of government agencies. This process can take several hours. If returning on a temporary travel document, police will undertake further investigations, for example, to ensure the returnee is not trying to hide their identity due to a criminal or terrorist background, outstanding court order or arrest warrant. This process can include contacting the person's claimed home suburb or town police, family and neighbours. If they departed illegally by boat, they will generally be found to have committed an offence under the *Immigrants and Emigrants Act 1949* (I&E Act). This can technically result in the imposition of a large fine or imprisonment but usually results in the issuance of a lesser fine which can be paid in instalments and no imprisonment; penalties are more likely to be pursued against facilitators and organisers of people smuggling ventures. If arrested they may remain in police custody at the CID airport office for up to 24 hours after arrival, possibly longer if a Magistrate is not readily available (for example, on a public holiday or weekend) and will be fingerprinted and photographed. Once processing at the airport is complete police will transport the returnee to the closest Magistrate's Court at the earliest

¹⁹ DFAT, "DFAT Country Information Report – Sri Lanka", 24 January 2017, CISED50AD105, p.29.

²⁰ Tamil Net "16 Batticaloa Tamils arrested within last 100 days at Colombo airport", 3 May 2015, CXBD6A0DE6027.

²¹ Freedom from Torture, "Sri Lanka - Update on torture since 2009", 6 May 2016, CIS38A8012881, pp.4,5.

²² DFAT, "DFAT Country Information Report – Sri Lanka", 24 January 2017, CISED50AD105, p.34.

²³ Ibid.

²⁴ UK Home Office, "Country Policy and Information Note. Sri Lanka: Tamil separatism. Version 4.0", 31 March 2017, OG6E7028822.

available opportunity for the matter to be heard by the Magistrate who will determine what happens next. If the returnee pleads guilty to having departed illegally they will generally be issued with a fine but are then free to go. If not pleading guilty they will be immediately granted bail on personal surety or having a family member act as guarantor. Their release may be briefly held up while they wait for the family member to pick them up if acting as guarantor. They will also have to attend court at a later date when their matter is being heard or if they have to give evidence as a witness in another case.

42. There is no credible evidence before me to suggest the applicant has any criminal background or outstanding court orders or arrest warrants or is otherwise wanted by the authorities. There is nothing to suggest the applicant was a facilitator or organiser of a people smuggling venture.
43. Based on the available country information I accept the applicant is likely to be detained at the airport for processing and may be held at the CID's office at the airport for up to 24 hours. It is possible he may be held in a nearby prison for a short period if a Magistrate is not available. Prison conditions in Sri Lanka are poor, due to overcrowding and a shortage of basic facilities.²⁵ If the applicant pleads guilty he will be fined (which he can pay in instalments) and free to leave immediately. If he does not plead guilty he will be immediately granted bail on certain conditions. In these circumstances any imprisonment would only be of short duration, at most only a few days. I am not satisfied the imposition of the fine, questioning and brief detention, possibly in poor prison conditions, would threaten his capacity to subsist or otherwise amount to 'serious harm'.
44. Having regard to the applicant's circumstances, I am not satisfied the treatment the applicant may experience as a consequence of his illegal departure (questioning, fine, brief detention, possibly in poor conditions) amounts to serious harm in this case.
45. Additionally, the country information before me indicates the I&E Act applies to all Sri Lankan citizens, and is not discriminatory on its face or in its application or enforcement. I am not satisfied it amounts to systematic and discriminatory conduct. As such I find the treatment the applicant will face as a consequence of the application of the I&E Act is not persecution for the purposes of s.5J(4) of the Act.

Refugee: conclusion

46. The applicant does not meet the requirements of the definition of refugee in s.5H(1). The applicant does not meet s.36(2)(a).

Complementary protection assessment

47. A criterion for a protection visa is that the applicant is a non-citizen in Australia (other than a person who is a refugee) in respect of whom the Minister (or Reviewer) is satisfied Australia has protection obligations because there are substantial grounds for believing that, as a necessary and foreseeable consequence of the person being removed from Australia to a receiving country, there is a real risk that the person will suffer significant harm.

Real risk of significant harm

48. Under s.36(2A), a person will suffer 'significant harm' if:

²⁵ DFAT, "DFAT Country Information Report – Sri Lanka", 24 January 2017, CISED50AD105, p.30.

- the person will be arbitrarily deprived of his or her life
- the death penalty will be carried out on the person
- the person will be subjected to torture
- the person will be subjected to cruel or inhuman treatment or punishment, or
- the person will be subjected to degrading treatment or punishment.

49. In considering the applicant's refugee status, I concluded that there was no 'real chance' the applicant would suffer harm on his return to Sri Lanka because he is a young Tamil male from Jaffna, because of his father's disappearance, his and his uncles' past experiences in Sri Lanka or status in Australia or because he has lived in Australia as an asylum seeker for the past five years. 'Real chance' and 'real risk' involve the same standard.²⁶ For the same reasons, I am also not satisfied the applicant would face a 'real risk' of significant harm.

50. For the reasons already discussed, I accept there is a real risk the applicant may be interviewed, charged for having departed illegally, fined and briefly detained, possibly in a prison, on his return to Sri Lanka. However, I am not satisfied that such treatment would amount to 'significant harm' as defined under s.36(2A). Based on the country information available and given the applicant is not of interest to the authorities in connection with an adverse security profile, there is not a real risk the applicant would be arbitrarily deprived of his life or subject to the death penalty on his return or be subject to torture. Furthermore, the evidence before me does not support a conclusion that there is any intention by the Sri Lankan authorities to inflict severe pain or suffering, pain or suffering or to cause extreme humiliation. I am not satisfied the applicant faces a real risk of significant harm as a consequence of his illegal departure.

Complementary protection: conclusion

51. There are not substantial grounds for believing that, as a necessary and foreseeable consequence of being returned from Australia to a receiving country, there is a real risk that the applicant will suffer significant harm. The applicant does not meet s.36(2)(aa).

Decision

The IAA affirms the decision not to grant the referred applicant a protection visa.

²⁶ *MIAC v SZQRB* [2013] 210 FCR 505.

Applicable law

Migration Act 1958

5 (1) Interpretation

...

bogus document, in relation to a person, means a document that the Minister reasonably suspects is a document that:

- (a) purports to have been, but was not, issued in respect of the person; or
- (b) is counterfeit or has been altered by a person who does not have authority to do so; or
- (c) was obtained because of a false or misleading statement, whether or not made knowingly

...

cruel or inhuman treatment or punishment means an act or omission by which:

- (a) severe pain or suffering, whether physical or mental, is intentionally inflicted on a person; or
- (b) pain or suffering, whether physical or mental, is intentionally inflicted on a person so long as, in all the circumstances, the act or omission could reasonably be regarded as cruel or inhuman in nature;

but does not include an act or omission:

- (c) that is not inconsistent with Article 7 of the Covenant; or
- (d) arising only from, inherent in or incidental to, lawful sanctions that are not inconsistent with the Articles of the Covenant.

...

degrading treatment or punishment means an act or omission that causes, and is intended to cause, extreme humiliation which is unreasonable, but does not include an act or omission:

- (a) that is not inconsistent with Article 7 of the Covenant; or
- (b) that causes, and is intended to cause, extreme humiliation arising only from, inherent in or incidental to, lawful sanctions that are not inconsistent with the Articles of the Covenant.

...

receiving country, in relation to a non-citizen, means:

- (a) a country of which the non-citizen is a national, to be determined solely by reference to the law of the relevant country; or
- (b) if the non-citizen has no country of nationality—a country of his or her former habitual residence, regardless of whether it would be possible to return the non-citizen to the country.

...

torture means an act or omission by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person:

- (a) for the purpose of obtaining from the person or from a third person information or a confession; or
- (b) for the purpose of punishing the person for an act which that person or a third person has committed or is suspected of having committed; or
- (c) for the purpose of intimidating or coercing the person or a third person; or
- (d) for a purpose related to a purpose mentioned in paragraph (a), (b) or (c); or
- (e) for any reason based on discrimination that is inconsistent with the Articles of the Covenant;

but does not include an act or omission arising only from, inherent in or incidental to, lawful sanctions that are not inconsistent with the Articles of the Covenant.

...

5H Meaning of refugee

(1) For the purposes of the application of this Act and the regulations to a particular person in Australia, the person is a refugee if the person:

- (a) in a case where the person has a nationality—is outside the country of his or her nationality and, owing to a well-founded fear of persecution, is unable or unwilling to avail himself or herself of the protection of that country; or
- (b) in a case where the person does not have a nationality—is outside the country of his or her former habitual residence and owing to a well-founded fear of persecution, is unable or unwilling to return to it.

Note: For the meaning of *well-founded fear of persecution*, see section 5J.

...

5J Meaning of well-founded fear of persecution

- (1) For the purposes of the application of this Act and the regulations to a particular person, the person has a well-founded fear of persecution if:
 - (a) the person fears being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion; and
 - (b) there is a real chance that, if the person returned to the receiving country, the person would be persecuted for one or more of the reasons mentioned in paragraph (a); and
 - (c) the real chance of persecution relates to all areas of a receiving country.

Note: For membership of a particular social group, see sections 5K and 5L.
- (2) A person does not have a well-founded fear of persecution if effective protection measures are available to the person in a receiving country.

Note: For effective protection measures, see section 5LA.
- (3) A person does not have a well-founded fear of persecution if the person could take reasonable steps to modify his or her behaviour so as to avoid a real chance of persecution in a receiving country, other than a modification that would:
 - (a) conflict with a characteristic that is fundamental to the person's identity or conscience; or
 - (b) conceal an innate or immutable characteristic of the person; or
 - (c) without limiting paragraph (a) or (b), require the person to do any of the following:
 - (i) alter his or her religious beliefs, including by renouncing a religious conversion, or conceal his or her true religious beliefs, or cease to be involved in the practice of his or her faith;
 - (ii) conceal his or her true race, ethnicity, nationality or country of origin;
 - (iii) alter his or her political beliefs or conceal his or her true political beliefs;
 - (iv) conceal a physical, psychological or intellectual disability;
 - (v) enter into or remain in a marriage to which that person is opposed, or accept the forced marriage of a child;
 - (vi) alter his or her sexual orientation or gender identity or conceal his or her true sexual orientation, gender identity or intersex status.
- (4) If a person fears persecution for one or more of the reasons mentioned in paragraph (1)(a):
 - (a) that reason must be the essential and significant reason, or those reasons must be the essential and significant reasons, for the persecution; and
 - (b) the persecution must involve serious harm to the person; and
 - (c) the persecution must involve systematic and discriminatory conduct.
- (5) Without limiting what is serious harm for the purposes of paragraph (4)(b), the following are instances of **serious harm** for the purposes of that paragraph:
 - (a) a threat to the person's life or liberty;
 - (b) significant physical harassment of the person;
 - (c) significant physical ill-treatment of the person;
 - (d) significant economic hardship that threatens the person's capacity to subsist;
 - (e) denial of access to basic services, where the denial threatens the person's capacity to subsist;
 - (f) denial of capacity to earn a livelihood of any kind, where the denial threatens the person's capacity to subsist.
- (6) In determining whether the person has a **well-founded fear of persecution** for one or more of the reasons mentioned in paragraph (1)(a), any conduct engaged in by the person in Australia is to be disregarded unless the person satisfies the Minister that the person engaged in the conduct otherwise than for the purpose of strengthening the person's claim to be a refugee.

5K Membership of a particular social group consisting of family

For the purposes of the application of this Act and the regulations to a particular person (the **first person**), in determining whether the first person has a well-founded fear of persecution for the reason of membership of a particular social group that consists of the first person's family:

- (a) disregard any fear of persecution, or any persecution, that any other member or former member (whether alive or dead) of the family has ever experienced, where the reason for the fear or persecution is not a reason mentioned in paragraph 5J(1)(a); and
- (b) disregard any fear of persecution, or any persecution, that:
 - (i) the first person has ever experienced; or

- (ii) any other member or former member (whether alive or dead) of the family has ever experienced;

where it is reasonable to conclude that the fear or persecution would not exist if it were assumed that the fear or persecution mentioned in paragraph (a) had never existed.

Note: Section 5G may be relevant for determining family relationships for the purposes of this section.

5L Membership of a particular social group other than family

For the purposes of the application of this Act and the regulations to a particular person, the person is to be treated as a member of a particular social group (other than the person's family) if:

- (a) a characteristic is shared by each member of the group; and
- (b) the person shares, or is perceived as sharing, the characteristic; and
- (c) any of the following apply:
 - (i) the characteristic is an innate or immutable characteristic;
 - (ii) the characteristic is so fundamental to a member's identity or conscience, the member should not be forced to renounce it;
 - (iii) the characteristic distinguishes the group from society; and
- (d) the characteristic is not a fear of persecution.

5LA Effective protection measures

- (1) For the purposes of the application of this Act and the regulations to a particular person, effective protection measures are available to the person in a receiving country if:
 - (a) protection against persecution could be provided to the person by:
 - (i) the relevant State; or
 - (ii) a party or organisation, including an international organisation, that controls the relevant State or a substantial part of the territory of the relevant State; and
 - (b) the relevant State, party or organisation mentioned in paragraph (a) is willing and able to offer such protection.
- (2) A relevant State, party or organisation mentioned in paragraph (1)(a) is taken to be able to offer protection against persecution to a person if:
 - (a) the person can access the protection; and
 - (b) the protection is durable; and
 - (c) in the case of protection provided by the relevant State—the protection consists of an appropriate criminal law, a reasonably effective police force and an impartial judicial system.

...

36 Protection visas – criteria provided for by this Act

...

- (2) A criterion for a protection visa is that the applicant for the visa is:
 - (a) a non-citizen in Australia in respect of whom the Minister is satisfied Australia has protection obligations because the person is a refugee; or
 - (aa) a non-citizen in Australia (other than a non-citizen mentioned in paragraph (a)) in respect of whom the Minister is satisfied Australia has protection obligations because the Minister has substantial grounds for believing that, as a necessary and foreseeable consequence of the non-citizen being removed from Australia to a receiving country, there is a real risk that the non-citizen will suffer significant harm; or
 - (b) a non-citizen in Australia who is a member of the same family unit as a non-citizen who:
 - (i) is mentioned in paragraph (a); and
 - (ii) holds a protection visa of the same class as that applied for by the applicant; or
 - (c) a non-citizen in Australia who is a member of the same family unit as a non-citizen who:
 - (i) is mentioned in paragraph (aa); and
 - (ii) holds a protection visa of the same class as that applied for by the applicant.
- (2A) A non-citizen will suffer **significant harm** if:
 - (a) the non-citizen will be arbitrarily deprived of his or her life; or
 - (b) the death penalty will be carried out on the non-citizen; or
 - (c) the non-citizen will be subjected to torture; or
 - (d) the non-citizen will be subjected to cruel or inhuman treatment or punishment; or
 - (e) the non-citizen will be subjected to degrading treatment or punishment.

- (2B) However, there is taken not to be a real risk that a non-citizen will suffer significant harm in a country if the Minister is satisfied that:
- (a) it would be reasonable for the non-citizen to relocate to an area of the country where there would not be a real risk that the non-citizen will suffer significant harm; or
 - (b) the non-citizen could obtain, from an authority of the country, protection such that there would not be a real risk that the non-citizen will suffer significant harm; or
 - (c) the real risk is one faced by the population of the country generally and is not faced by the non-citizen personally.

...

Protection obligations

- (3) Australia is taken not to have protection obligations in respect of a non-citizen who has not taken all possible steps to avail himself or herself of a right to enter and reside in, whether temporarily or permanently and however that right arose or is expressed, any country apart from Australia, including countries of which the non-citizen is a national.
- (4) However, subsection (3) does not apply in relation to a country in respect of which:
- (a) the non-citizen has a well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion; or
 - (b) the Minister has substantial grounds for believing that, as a necessary and foreseeable consequence of the non-citizen availing himself or herself of a right mentioned in subsection (3), there would be a real risk that the non-citizen will suffer significant harm in relation to the country.
- (5) Subsection (3) does not apply in relation to a country if the non-citizen has a well-founded fear that:
- (a) the country will return the non-citizen to another country; and
 - (b) the non-citizen will be persecuted in that other country for reasons of race, religion, nationality, membership of a particular social group or political opinion.
- (5A) Also, subsection (3) does not apply in relation to a country if:
- (a) the non-citizen has a well-founded fear that the country will return the non-citizen to another country; and
 - (b) the Minister has substantial grounds for believing that, as a necessary and foreseeable consequence of the non-citizen availing himself or herself of a right mentioned in subsection (3), there would be a real risk that the non-citizen will suffer significant harm in relation to the other country.

Determining nationality

- (6) For the purposes of subsection (3), the question of whether a non-citizen is a national of a particular country must be determined solely by reference to the law of that country.
- (7) Subsection (6) does not, by implication, affect the interpretation of any other provision of this Act.